FILE COPY

Supreme Court
FILED
MAY 15 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972 57

NORTHERN BUILDING AND LOAN ASSOCIATION,
*Appellant,*

*vs.*

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

# STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. E. FINNEGAN,
BENJAMIN POSS,
JOSEPH P. BRAZY,
*Counsel for Appellees.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement opposing jurisdiction and motion to dismiss or affirm | 1 |
| Motion to dismiss | 1 |
| Motion to affirm | 1 |
| Nature of action and ruling below | 2 |
| The statutory provisions alleged to sustain jurisdiction are inapplicable to this case | 5 |
| The validity of the statutes of the United States, provision of the Constitution of the State of Wisconsin and statutes of the State of Wisconsin cited by appellants, is not involved in this appeal | 6 |
| The decision of the Supreme Court of the State of Wisconsin is obviously correct | 7 |


## Table of Cases Cited.


| | |
|---|---|
| Northern Building and Loan Association v. Cleary, etc., et al., 257 N. W. 684 | 8 |


## Statutes Cited.


| | |
|---|---|
| Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, 28 U S. C. 344(a), amending Section 237 of the Judicial Code | 5 |
| Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, 28 U. S. C. Supp. 861a | 6 |
| Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. Supp. 861b | 6 |
| Act of Congress of June 13, 1933, 48 Stat. 128, 132, as amended by the Act of Congress of April 27, 1934, 48 Stat. 643 (12 U. S. C. Supp. 1464), Section 5 (1) | 6, 7 |
| Constitution of the State of Wisconsin, Article II, Section 1 | 3 |
| Article XI, Section 1 | 7 |
| Judicial Code, Section 237, as amended (28 U. S C. A. 344) | 2 |
| Rules of the Supreme Court of the United States, Rule 7, Par. 3 | 2 |
| Rule 7, Par. 4 | 2 |
| Rule 7, Par. 5 | 2 |
| Rule 12, Par. 3 | 2 |
| Wisconsin Statutes, 1933, Chapter 215 | 7 |

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1934**

---

# No. 972

---

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION,

*Appellant,*

*vs.*

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

*Appellees.*

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

**(1) Motion to Dismiss Appeal or, in the alternative.**

**(2) Motion to Affirm.**

**(3) Statement Disclosing Matter or Ground Making Against Jurisdiction of the Supreme Court Asserted by the Appellant.**

(Rule 12 (3); 7 (3), (4) and (5).)

Filed May 16, 1935.

(1) The appellees move the court to dismiss the appeal herein for the reason that said appeal does not present

any substantial Federal question, nor is the decision in this cause an appealable decision under Judicial Code, Section 237, as amended (Section 344, U. S. C. A., Title 28). Rule 12 (3); 7 (3), (4) and (5).

(2) In the event that said motion to dismiss said appeal be denied, then in the alternative, appellees move the Court to affirm the judgment herein for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 12 (3); 7 (3), (4) and (5).

In support of said motion and in opposition to the jurisdiction of this Court, appellees submit the following statement disclosing matter or ground making against the jurisdiction of this Court asserted by the appellants.

I.

**Nature of Action and Ruling Below.**

The appellees constitute the Banking Commission of the State of Wisconsin in which is vested the power to control and superintend Wisconsin building and loan associations. The appellant is a Wisconsin building and loan association. The appellant commenced this action in the Circuit Court of Milwaukee County, Wisconsin, seeking to restrain the Banking Commission from interfering with its plan to convert itself into a Federal savings and loan association. The Banking Commission counterclaimed asking a declaration that it have full power and authority to take possession of the appellant association under the laws of the State of Wisconsin and for an injunctional order restraining the appellant from so converting.

Two companion cases *State ex rel. Peter A. Cleary et al. v. Hopkins Street Bldg. & Loan Ass'n, a Wisconsin Corporation, et al.* and *Reliance Bldg. & Loan Ass'n, a*

*Corporation*, v. *Peter A. Cleary et al., as Banking Commission et al.*, now pending in this Court, were heard in the Supreme Court of the State of Wisconsin at the same time and the opinion therein is entitled in the three causes. This opinion is reported in Vol. 257 of the Northwestern Reporter at page 684.

The Supreme Court of the State of Wisconsin granted the Banking Commission the judgment which it prayed in the three cases. While the power of the Congress to create Federal savings and loan associations was challenged by the appellees, as were other provisions of the Home Owners' Loan Act of 1933, the State Supreme Court did not pass on the validity of this Federal legislation.

The precise question passed upon by the Wisconsin Supreme Court is "• • • the power of a building and loan association organized under and subject to the laws of the State of Wisconsin to convert itself into a savings and loan association under the Federal act." Page 686 of Vol. 257 of Northwestern Reporter.

The court first considered whether or not the State associations possess such power under the provisions of their charter or the laws of the State of Wisconsin. In concluding that the local association did not have this power, the court pointed out that these associations are not banks and do not have banking powers or privileges under the State laws; that their charters do not authorize them to divest themselves of the corporate powers conferred upon them by the laws of the State; that though the Wisconsin Constitution (Sec. 1, Article II) vests in our legislature the reserve power to alter or repeal corporate charters, even that body could not alter or repeal the charter of a corporation so as to authorize any part of the stockholders to impose a new charter upon non-consenting stockholders of the corporation under the estab-

lished law of the State of Wisconsin; that the purpose of the reserve power was to enable the State to retain control over its associations and it would seem to follow that the legislature is without any authority to divest itself of this reserve power even in the absence of non-consenting members.

After concluding that the State of Wisconsin had not accorded its building and loan associations the privilege of transmutation or conferred this power upon them, the court then logically suggested the following two questions:

> "First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest respondents with corporate power essential to a transmutation?
>
> "Second, If it be found that it was the purpose of Congress by that act thus to increase respondents' corporate powers, then, has Congress the power to accomplish this result?"

In answer to the first question the court concluded that the Home Owners' Loan Act did not attempt to supersede the authority of the State and invest the respondents with the corporate power essential to a transmutation. It concluded that the State still has the right to charter corporations and retain control over them from the date of their beginning until dissolution. The court pointed out that the act does not purport to invest the various State corporations with any new or different corporate powers. The act does no more than to afford consent to transmutation applicable to corporations having the power to transmute. In view of the interpretation of the Federal act adopted by our State Supreme Court, it deemed it unnecessary to consider the second question.

The provisions of the Federal act which appellants claim gives a State building and loan association right to convert,

despite any State law to the contrary, and which was interpreted by the Wisconsin Supreme Court, reads as follows:

> "Sec. 5. * * * (i) Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter."

II.

**The Statutory Provisions Alleged to Sustain Jurisdiction are Inapplicable to This Case.**

Under Subdivision "A" of the appellants' Statement as to Jurisdiction entitled "Statutory Provisions Sustaining Jurisdiction," appellants point to the provisions of the Act of Congress approved February 13, 1925, Chapter 229, 43 Stat. 936; U. S. C. Title 28, Sec. 344 (a), which amends subsection (a) of Sec. 237 of the Judicial Code, and which reads as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its

discretion, award execution or remand the cause to the court from which it was removed by the writ."

By virtue of the statutory enactments cited in appellants' brief, the writ of error was abolished and the remedy of appeal substituted therefor. The Act of Congress approved January 31, 1928, Chapter 14; 45 Stat. 54; U. S. C. Supp., Title 28, Sec. 861a. The Act of Congress approved April 26, 1928, Chapter 440; 45 Stat. 466; U. S. C. Supp., Title 28, Sec. 861b.

There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

The opinion of the Supreme Court of the State of Wisconsin in this case discussed, but did not determine any constitutional questions, either State or Federal.

The State court held, in substance, that conversion by a Wisconsin building and loan association into a corporation of another sovereign was contrary to the laws of the State of Wisconsin and that the Federal statute, Sec. 5 (i) of the Home Owners' Loan Act of 1933, upon which the appellants rely, did not purport to authorize such conversion, contrary to the laws of the State under which the building and loan association was organized.

## III.

**The Validity of the Statutes of the United States, Provision of the Constitution of the State of Wisconsin and Statutes of the State of Wisconsin, Cited by Appellants, is not Involved in This Appeal.**

Under subdivision "b" of the Statement as to Jurisdiction submitted by appellants, are cited the provisions of

Section 5 of the Act of Congress approved June 13, 1933;

48 Stat. 128 at page 132, as amended by the Act of Congress approved April 27, 1934;
48 Stat. 643;
U. S. C. Supp., Title 12, Sec. 1464;
Section 1 of Article XI of the Constitution of the State of Wisconsin;
Provisions of Chapter 215 of the Wisconsin Statutes for the year 1933.

It is claimed that the validity of the foregoing statutes and provision of the Constitution of the State of Wisconsin are herein involved.

The appellants at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin.

The validity of the provisions of the Home Owners' Loan Act, and particularly of Section 5 (i) thereof, providing for conversion were challenged by the *appellees*, but the Supreme Court of the State of Wisconsin did not pass on its validity. It merely held that this section "does not attempt to invest the State corporations with any power not granted to them by the State which created them. * * * It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. * * * It does not appear to be a supplanting of the requirements in the charter of a corporation" (page 689 of Vol. 257 of the Northwestern Reporter).

## IV.

**The Decision of the Supreme Court of the State of Wisconsin is Obviously Correct.**

The only Federal right which the State corporation can possibly claim was denied by the decision of the Supreme Court of the State of Wisconsin is its alleged right to con-

vert "into a Federal Savings and Loan Association under this act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; * * *" as provided in Section 5 (i) of the Home Owners' Loan Act of 1933. The appellant bases its right to convert upon the foregoing quoted language.

It is clear that this language is permissive only. Its provisions merely set up the entrance requirements for a membership and do not purport to carry any powers to a State corporation contrary to the State law, as was stated in the opinion of the Wisconsin Court, 257 N. W. 684, 689:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corporations with any new or different corporate powers. It does no more than to afford consent applicable to corporations having power to transmute. If a State, either in the original charter of its corporation or by subsequent legislation, permitted such a transmutation as is proposed here upon consent of 75 per centum of the stockholders, such a corporation could not change into a Federal corporation upon a vote of 51 per centum of the stockholders. Nor would a State statute providing a minimum below 51 per centum render the association acceptable. The 51 per centum provision set up in the Federal act may readily be interpreted as the manner of consenting by the membership which the Federal

government requires to a transmutation. The opportunity is thus afforded to those who are so situated that they can accept the offer if it be deemed by them to be to their advantage. It does not appear to be a supplanting of the requirements in the charter of a corporation. Were it otherwise, the exercise of such a power would do two things—first, it would enable a building and loan association to escape from regulatory control reserved by the State; and, second, it would divest stockholders of their rights in the corporation under the State law, and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the State and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation. *Huber* v. *Martin, supra.*"

It is respectfully submitted that the decision sought to be reviewed is not appealable and that in any event no substantial Federal question is presented, and that therefore the appeal herein should be dismissed or the judgment should be affirmed.

Respectfully submitted,

J. E. FINNEGAN,
*Attorney General,*
BENJAMIN POSS,
JOSEPH P. BRAZY,
*Attorneys for Appellees.*

(6371-C)